FEDERAL COURT OF AUSTRALIA

Maughan Thiem Auto Sales Pty Ltd v Cooper [2014] FCAFC 94

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| Citation: | Maughan Thiem Auto Sales Pty Ltd v Cooper [2014] FCAFC 94 |
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| Appeal from: | Cooper v Maughan Thiem Auto Sales Pty Ltd [2012] SAIRC 51 |
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| Parties: | **MAUGHAN THIEM AUTO SALES PTY LTD v ADAM COOPER** |
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| File number: | SAD 78 of 2014 |
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| Judges: | **GREENWOOD, BESANKO AND KATZMANN JJ** |
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| Date of judgment: | 1 August 2014 |
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| Catchwords: | **INDUSTRIAL LAW** – whether employee entitled to redundancy pay and long service leave  **STATUTORY INTERPRETATION** – meaning of “base rate of pay” – *Fair Work Act 2009* (Cth) s 16  **STATUTORY INTERPRETATION** – meaning of “applicable award-derived long service leave terms” – whether an employee is “entitled … to long service leave” under an award if employee’s entitlement to long service leave has not accrued – *Fair Work Act 2009* (Cth) s 113 |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 15AA  *Fair Work Act 2009* (Cth) ss 16(1), ss 113, 117, 119, 570  *Long Service Leave Act 1987* (SA), ss 3, 8 |
|  |  |
| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27  *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384  *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1982) 149 CLR 337  *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508  *Maughan Thiem Auto Sales Pty Ltd v Cooper* (2013) 216 FCR 197  *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252  *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 |
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| Date of hearing: | Heard on the papers | |
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| Place: |  | |
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| Division: |  | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 59 | |
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| Counsel for the Respondent: | Mr R Manuel with Mr S Ridley | |
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| Solicitor for the Respondent: | Rossi Legal | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | SAD 78 of 2014 |

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| ON APPEAL FROM THE INDUSTRIAL RELATIONS COURT OF SOUTH AUSTRALIA |

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| BETWEEN: | MAUGHAN THIEM AUTO SALES PTY LTD  Appellant |
| AND: | ADAM COOPER  Respondent |

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| JUDGES: | GREENWOOD, BESANKO AND KATZMANN JJ |
| DATE OF ORDER: | 1 august 2014 |
| WHERE MADE: | ADELAIDE |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Order 2 made by the industrial magistrate on 14 April 2014 be set aside and the respondent’s entitlement to redundancy pay be calculated on the basis of his base rate of pay, being his weekly salary as at 16 September 2011 less the 18% shift premium, namely $9,842.
3. Order 4 made by the industrial magistrate on 14 April 2014 be set aside and the respondent’s claim in respect of long service leave be dismissed.
4. Order 5 made by the industrial magistrate on 14 April 2014 be set aside and the respondent’s entitlement to pre-judgment interest be $2,322.75.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| ON APPEAL FROM THE INDUSTRIAL RELATIONS COURT OF SOUTH AUSTRALIA |

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| BETWEEN: | MAUGHAN THIEM AUTO SALES PTY LTD  Appellant |
| AND: | ADAM COOPER  Respondent |

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| JUDGES: | GREENWOOD, BESANKO AND KATZMANN JJ |
| DATE: | 1 august 2014 |
| PLACE: | ADELAIDE |

**REASONS FOR JUDGMENT**

# Greenwood AND besanko JJ

1. We have had the advantage of reading the reasons for judgment of Katzmann J. We agree with her Honour’s conclusions as set out in paragraph 57 and her Honour’s reasons for reaching those conclusions. We agree with the orders proposed by her Honour.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justices Greenwood and Besanko. |

Associate:

Dated: 1 August 2014

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE INDUSTRIAL RELATIONS COURT OF SOUTH AUSTRALIA |

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| BETWEEN: | MAUGHAN THIEM AUTO SALES PTY LTD  Appellant |
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| JUDGES: | GREENWOOD, BESANKO AND KATZMANN JJ |
| DATE: | 1 august 2014 |
| PLACE: | ADELAIDE |

**REASONS FOR JUDGMENT**

# katzmann j

1. Maughan Thiem Auto Sales Pty Ltd (“Maughan”) employed Adam Cooper as a motor mechanic. Mr Cooper’s employment came to an end within 10 years. He later sued Maughan in the Industrial Relations Court of South Australia (“IRCSA”) seeking redundancy pay and pay in lieu of notice. He also sued for pro-rata long service leave to which he claimed to be entitled under the *Long Service Leave Act 1987* (SA) (“the State Act”). Maughan denied he was entitled to redundancy pay or to payment in lieu of notice on the ground that he had not been made redundant but had resigned from his employment. Maughan also denied that he was entitled to long service leave because the relevant award did not provide for pro-rata long service leave within 10 years of service and the State Act, which did, was inapplicable.
2. The industrial magistrate held that Mr Cooper had been made redundant and was entitled to 14 weeks’ redundancy pay and three weeks’ pay in lieu of notice in accordance with ss 119 and 117 of the *Fair Work Act 2009* (Cth) (“FW Act”) respectively. The industrial magistrate also held that Mr Cooper was entitled to pro-rata long service leave payments under the State Act. But his Honour made no orders. Rather, he invited submissions from the parties about “final orders and interest”.
3. Maughan nevertheless filed an appeal. The appeal did not contest the industrial magistrate’s findings that Mr Cooper was made redundant or that he was entitled to both redundancy pay and pay in lieu of notice. Rather, it challenged his Honour’s conclusions about the method to be used for calculating Mr Cooper’s redundancy entitlement, the finding that Mr Cooper was entitled to long service leave and, if that finding was correct, the rate at which he should be paid.
4. Appeals lie to the Federal Court from decisions of an eligible State or Territory court exercising jurisdiction under the FW Act: FW Act, s 565. The Court as presently constituted heard Maughan’s appeal. While the industrial magistrate was certainly exercising jurisdiction under the FW Act, this Court held that the appeal was not competent as there had been no decision within the meaning of that word in s 565 and dismissed the appeal on that basis without proceeding to determine the substantive issues: *Maughan Thiem Auto Sales Pty Ltd v Cooper* (2013) 216 FCR 197.
5. Since then, the matter returned to the IRCSA and, on 14 April 2014, after hearing from the parties, the industrial magistrate granted leave to Mr Cooper to amend the amount of his claim and made orders. The effect of those orders is that Maughan is required to pay Mr Cooper a total amount of $27,011.01, made up as follows:
6. $11,613.56 in redundancy pay;
7. $2,488.62 by way of pay in lieu of notice;
8. $8,627.22 for 10.4 weeks of long service leave; and
9. $4,281.61 in pre-judgment interest.
10. On 17 April 2014 Maughan filed a notice of appeal. This appeal challenges the orders for redundancy pay, long service leave and interest. The parties elected to rely on their previous submissions and not to make any further submissions. The grounds of appeal are substantively the same as those pleaded in the earlier appeal.
11. As I observed in my earlier reasons for judgment, in substance the appeal raises two broad issues:
12. Should Mr Cooper’s weekly salary as at the date of termination be used as the base rate for calculating his redundancy entitlement (as the industrial magistrate determined) or should his entitlement be measured by his weekly salary minus the shift premium (as Maughan contended) (ground 1)?; and
13. Was Mr Cooper entitled to long service leave under the State Act and, if so, at what rate (grounds 2–6)?

# The facts

1. Before considering these issues it is necessary to record the salient facts.
2. Mr Cooper worked for Maughan from 28 October 2002 until 19 September 2011.
3. He was first employed on a full-time permanent basis, working five days a week, starting at 8.00 am each day. In January 2008 Maughan introduced an afternoon shift to its service department and asked Mr Cooper to work permanently on that shift over four longer days instead of five. Under the new arrangement Mr Cooper worked from Monday to Thursday, starting work each day at noon and finishing at 10.00 pm. The parties entered into a new contract recording his annual remuneration and noted that it included an 18% “penalty rate” for the afternoon shift. Mr Cooper worked in accordance with the new arrangement for about nine months at which point the hours of the afternoon shift were changed to 5.00 pm until 3.00 am. Mr Cooper worked these hours for the ensuing three years until his employment came to an end after Maughan decided to do away with the afternoon shift.
4. Maughan told the shift workers that alternative positions would be offered within the day shift but that their salary would be reduced by the removal of the shift premium. Mr Cooper considered this proposal unacceptable and refused to work on this basis. He considered that he had been made redundant. He asked Maughan for 14 weeks’ redundancy pay and four weeks’ pay in lieu of notice in accordance with ss 119 and 117 of the FW Act respectively.
5. The industrial magistrate found that Mr Cooper had been given only one week’s pay in lieu of notice and hence that he was entitled to three additional weeks’ pay.
6. It was agreed that at the time his employment came to an end Mr Cooper had completed at least eight years of continuous service within the meaning of the State Act.

# redundancy

## The relevant legislative provisions

1. Section 119(2) of the FW Act relevantly provides:

The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee’s base rate of pay for his or her ordinary hours of work:

| **Redundancy pay period** | | |
| --- | --- | --- |
|  | [**Employee**](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#employee)**’s period of** [**continuous service**](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#continuous_service) **with the** [**employer**](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#employer) **on termination** | **Redundancy pay period** |
| 1 | At least 1 year but less than 2 years | 4 weeks |
| 2 | At least 2 years but less than 3 years | 6 weeks |
| 3 | At least 3 years but less than 4 years | 7 weeks |
| 4 | At least 4 years but less than 5 years | 8 weeks |
| 5 | At least 5 years but less than 6 years | 10 weeks |
| 6 | At least 6 years but less than 7 years | 11 weeks |
| 7 | At least 7 years but less than 8 years | 13 weeks |
| 8 | At least 8 years but less than 9 years | 14 weeks |
| 9 | At least 9 years but less than 10 years | 16 weeks |
| 10 | At least 10 years | 12 weeks |

1. The critical words are “the employee’s base rate of pay”.

## What is the base rate for calculating the redundancy entitlement?

1. The industrial magistrate held (at [30]) that the base rate for Mr Cooper’s ordinary hours of work was his weekly salary as of 16 September 2011. He did not explain why. It is common ground that Mr Cooper’s weekly salary at the time included an 18% shift premium. Clause 2.1 of his contract of employment provided for an annual salary of $43,136.08 before tax but added:

This amount is inclusive of an 18% penalty rate for afternoon shift work.

1. The industrial magistrate referred to this provision in [7] of his judgment as “an 18% increase in pay in recognition of the permanent afternoon shift”. The source of this description is obscure. It does not appear in the contract. As Mr Cooper pointed out, the terms of the contract must be interpreted in an objective manner, without regard to the subjective intentions of the parties: see, for example, *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at [40]; *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352 per Mason J.
2. “Base rate of pay” is relevantly defined in s 16(1) of the FW Act to mean:

the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

1. incentive-based payments and bonuses;
2. loadings;
3. monetary allowances;
4. overtime or penalty rates;
5. any other separately identifiable amounts.
6. His Honour did not refer to the statutory definition. It is not clear whether his attention was drawn to it.
7. The inclusion of the 18% “penalty rate” is redolent of the afternoon shift premium contained in the *Vehicle Industry – Repair, Services and Retail Award 2002,* which at the relevant time provided:

**23. SHIFT WORK AND RATES THEREFOR**

…

* + - 1. An employee working on afternoon or night shift shall except on a Saturday, Sunday or holiday, referred to in clause 26 of this award be paid **in addition to his ordinary rate**, an amount equal to the following relevant percentage of his ordinary rate:

**%**

**…**

(ii) if working on afternoon shift only 18

…

(Emphasis added.)

1. A provision to the same effect can be found in cl 42.2 of the modern award (*Vehicle Manufacturing, Repair, Services and Retail Award 2010*), first made on 4 September 2009, and which applied to the parties at the time Mr Cooper’s employment came to an end.
2. Mr Cooper submitted that the 18% referred to in his contract was not a premium (or penalty). Rather, he said it was part of the agreed variation to the contract that occurred in 2008 and he was entitled to the increase “for all purposes”. He contended that it was illogical to exclude the 18% from the calculation of the base rate of pay. As he became redundant at the time he was working the afternoon shift and his pay at that point included the 18%, he submitted that it was the inclusive amount that represented his base rate. He also submitted, in effect, that because the 18% was included in his contract and was not paid pursuant to the award it could be ignored because the definition of “base rate of pay” in s 16(1) of the FW Act only excluded penalty rates fixed by an award.
3. I reject these submissions. The contract provided for a separately identifiable “penalty rate” for working the afternoon shift. In that respect it reflected the terms of the award. Presumably, that was its intention. I accept that merely because it is described as a “penalty rate” does not mean that it is. It might equally have been called a shift loading or allowance. But whatever it is called, it is a “separately identifiable” amount. Contrary to Mr Cooper’s argument, it does not matter that the salary is stated in the contract to be inclusive of the 18% “penalty rate”; what matters is that the rate falls within the terms of s 16(1) of the FW Act. The position would doubtless be different if the contract had been silent as to a shift allowance or had simply stated that the remuneration was inclusive of any or all penalties or allowances. The argument that s 16(1) was designed only to exclude award-derived penalty rates does not withstand scrutiny. There is no reason to read the section down in this way. On the contrary, the section is broad in its scope and, as Mr Cooper conceded, bonus payments, which are also mentioned in the subsection, are not typically creatures of awards.
4. The industrial magistrate was therefore in error to identify Mr Cooper’s base rate of pay “per s 119(2)” as his weekly salary on the date he last worked.

# long service leave

1. The issue is whether the industrial magistrate erred in finding that Mr Cooper had an entitlement to long service leave under the State Act. It is common ground that, if the *Vehicle Industry – Repair Services and Retail – (Long Service Leave) Award 1977* (“LSL award”) applied to Mr Cooper, then he had no entitlement to long service leave. On the other hand, if the State Act governed Mr Cooper’s long service leave claim, he was entitled to a payment reflecting 10.4 weeks’ pay.

## Did the State Act govern Mr Cooper’s long service leave claim?

1. The answer to this question turns on the construction of s 113 of the FW Act. In particular, it turns on whether there are “applicable award-derived long service leave terms” in relation to Mr Cooper. Section 113, which is contained in Part 2-2 of the Act, relevantly provides:

**113 Entitlement to long service leave**

*Entitlement in accordance with applicable award-derived long service leave terms*

* + 1. If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

* + 1. …
    2. ***Applicable award-derived long service leave terms***, in relation to an employee, are:
       1. terms of an award … that …:
          1. would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and
          2. would have entitled the employee to long service leave; and
       2. any terms of the award … that are ancillary or incidental to the terms referred to in paragraph (a).

(3A) For the purpose of subparagraph (3)(a)(i), the test time is:

1. immediately before the commencement of this Part…
2. Part 2 of the FW Act commenced on 1 January 2010. Thus, “the test time” for the purpose of s 113 is 31 December 2009. The industrial magistrate said it was 1 January 2010 but the difference is immaterial.
3. It was common ground that, if s 113(3)(a) applied, then the State Act did not govern Mr Cooper’s long service leave claim. In other words, Mr Cooper was entitled to long service leave under the State Act only if there were no “applicable award-derived long service leave terms” (as defined in subsection (3)) that related to him. Consequently, the question below was whether s 113(3)(a) applied to him. To answer that question it was necessary to decide first, whether there was an award containing terms which would have applied to Mr Cooper immediately before Part 2-2 of the Act commenced and secondly, whether the terms of that award would have entitled him to long service leave. Maughan’s case was that there are terms in the LSL award that would have applied to Mr Cooper at the test time and that would have entitled him to long service leave. Consequently, Maughan contended that the State Act did not govern Mr Cooper’s long service leave claim.
4. The industrial magistrate accepted that the terms of the LSL award would have applied to Mr Cooper at the relevant time and that Maughan was a respondent to the LSL award (Mr Cooper had argued to the contrary). For these reasons his Honour found that s 113(3)(a)(i) was satisfied. But his Honour rejected Maughan’s argument that the award would have entitled Mr Cooper to long service leave at the relevant time.
5. His Honour concluded (at [47]) that s 113(3)(a)(ii) required that, for there to be “applicable award-derived long service leave terms”, there had to be “an actual entitlement to take long service leave or to pro-rata long service leave at [the test time]” and there was no such entitlement in this case. That was because the LSL award did not entitle an employee to take long service leave until he or she had completed at least 10 years’ service.
6. Maughan challenged this conclusion. Its point, based on the words used in s 113, is that any award that makes provision for long service leave entitlements for employees contains an entitlement to long service leave and there is nothing in the text to suggest otherwise. It submitted, in effect, that this construction would also best achieve the statutory purpose. As Maughan put it:

[T]he section is transitional in nature. The clear intent manifested by s.113 in its entirety is to maintain the various schemes for provision of long service leave. Thus s.113(2) preserves the effects of the various kinds of instrument already in existence – in particular, agreements – capable of conferring long service leave entitlements upon employees. Section 113(3) then, consistently, looks to preserve the operation of terms of awards that are already in place as at the test time which make provision for long service leave entitlements. It does this by continuing the application of those long service leave entitling award terms, both to those employees who are already bound by such awards (whether or not such entitlements have actually accrued) and extending the effect of those terms to employees engaged after 1 January 2010, who would have been entitled to long service leave under any such award had they been engaged before that date. By this means s.113, in its various subsections, continues the variety of provisions that confer long service leave entitlements.

The interpretation preferred by the Industrial Magistrate would have the reverse effect. Limiting the continuity of long service leave entitlements to entitlements actually accrued would significantly disrupt expectations of employers and employees alike. There is no purposive logic to such a limitation.

1. Maughan contended that its construction is supported by the Explanatory Memorandum to the Fair Work Bill 2008 (Cth), which relevantly recites (in [441]) that the clause “preserves the effect of long service leave terms in pre-modernised awards (i.e., awards as they stood immediately before commencement of the [National Employment Standards])”, the LSL award being such an award.
2. Mr Cooper, on the other hand, maintained that there was no entitlement to long service leave under the LSL award until the employee was eligible to take leave, that is to say, until his entitlement had actually accrued. Mr Cooper had worked an insufficient number of years to accrue long service leave under the LSL award, which only provided for long service leave after 15 years’ service and after 10 in certain circumstances. In contrast, Mr Cooper had worked a sufficient number of years for the purposes of the State Act, which provided for payment on termination after seven years (except in cases of termination for serious and wilful misconduct or unlawful termination by the employee).
3. In his written submissions Mr Cooper relied on one authority to support his argument. That was *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508. It is hard to see how that case is relevant. In *Jemena* the High Court held that a State law providing for portable long service leave benefits for workers in the construction industry did not conflict with federal industrial instruments providing for the grant of, and payment for, long service leave because the State law was complementary to the operation of the federal instruments. In short, as Coinvest put it in that case, the State Act did not enter the field covered by the federal instruments. The subject matter of the portable long service leave benefits was not covered in the federal instruments.
4. That issue does not arise in the present case. As Maughan submitted, there is no issue here of inconsistency between State and Commonwealth laws. The question is simply one of statutory construction. Notwithstanding a suggestion to the contrary in his written submissions, Mr Cooper did not argue otherwise.
5. This case turns, then, on the proper construction of s 113 of the FW Act. On that question, Maughan’s submissions should be accepted.
6. Interpreting the true meaning of the section begins with a consideration of the text: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [33]–[34]. But the words of the section must be read in context and having regard to the statutory purpose or object: *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408. In interpreting a provision in an Act, the interpretation that would best achieve the purpose or object of the Act (regardless of whether the purpose or object is expressly stated) is to be preferred to each other interpretation: *Acts Interpretation Act 1901* (Cth), s 15AA.
7. Turning first to the text, for there to be “applicable award-derived long service leave terms” the section expressly requires that two conditions be satisfied.
8. The first condition is that there is an award which would have applied to Mr Cooper at the test time if, at that time, he had been in his “current circumstances of employment”. It was common ground that “current circumstances of employment” referred to Mr Cooper’s circumstances of employment just before his employment with Maughan ended (that being the relevant time for considering his long service leave entitlement).
9. The second condition is that the terms of the award “would have entitled” Mr Cooper to long service leave. This was the subject of the dispute. So what is meant by “terms of an award…that…would have entitled”?
10. The language here is awkward, the meaning ambiguous. On one possible interpretation the phrase refers to terms that provide for an entitlement to long service leave. Alternatively, as Mr Cooper argued, it may refer to an entitlement that would have actually accrued.
11. In my view, the first interpretation is to be preferred. The second condition in s 113(3)(a) is satisfied if, at the test time, the employee would have had a right to long service leave under a relevant award (that is, an award satisfying the first condition in s 113(3)(a)), irrespective of whether at that time the employee would have accrued long service leave. If there was a federal long service leave award or terms in a federal award that provided for the payment of long service leave that would have applied to the employee at the test time, then they continue to apply. If not, then the State or Territory Act applied. If, under the terms of the award, Mr Cooper was not eligible for long service leave at the time of his redundancy, s 113 does not give him an entitlement under the State Act.
12. When regard is had to the legislative context and purpose, Mr Cooper’s construction of s 113 is untenable. If it were to be accepted, there would be “applicable award-derived long service leave terms” in relation to an employee at the point at which an employee had worked sufficient years to accrue long service leave under the relevant award. From that point onwards, the award would govern the employee’s long service leave, but before that point, the employee’s long service leave would be governed by the State or Territory Act. This cannot be what Parliament intended. As Maughan submitted, s 113 is a transitional provision that is designed to preserve the effect of long service leave terms in awards as they stood before the commencement of the National Employment Standards.
13. The industrial magistrate said (at [47]) that on the construction for which Maughan contended, the provision in s 113(3)(a)(ii) would be redundant: “a superfluous restatement of s 113(3)(a)(i)”. I respectfully disagree. Paragraph (a)(i) says nothing about long service leave. It is concerned with whether there was an award in place at the relevant time that would have applied to the employee. Paragraph (a)(ii) is concerned with whether that award includes an entitlement to long service leave. The two paragraphs must be read together.
14. The industrial magistrate also said (at [48]) that the LSL award had to be considered against the individual employee’s circumstances because it only covered permanent full-time employees (citing cl 16), whereas casual and part-time employees in South Australia were covered by the State Act. Clause 16, however, merely reserves leave to a party to the award to apply for inclusion of provisions regarding part-time and casual workers, amongst other matters. The award covers all employees. The opening paragraph of the coverage clause (cl 3), which is entitled “parties bound and incidence of award”, reads as follows:

**This award shall as to all employees** whether members of an organization or not **operate in the States of** New South Wales, Queensland, Victoria, **South Australia** and Tasmania **in the industries set out in subclause 3(a) of the Vehicle Industry - Repair, Services and Retail - Award 1976 as varied from time to time** and subject to clause 13 of this award to the same extent as the said award **but subject to the same exceptions, exemptions and reservations as are provided by that award**.

(Emphasis added.)

1. Clause 13 is irrelevant for present purposes.
2. Clause 4 states that:

An employee shall be entitled to long service leave with pay in respect of service with an employer as in this award provided.

1. “Employee” is not defined. But the reservation of leave in cl 16 to include provisions regarding part-time and casual workers does not, of itself, limit the meaning of “employee” in cl 4 to permanent full-time employees. The coverage clause (cl 3) makes that clear. The award does not include an exception or exemption for part-time and casual employees. The only exemption in the award is contained in cl 12 and neither party argued it had any application to the present case. The evident purpose of cl 16 was to enable the award to be varied to include special provisions relating, amongst other things, to those classes of employees. In my opinion, the award was intended to apply to all employees in the relevant industries.
2. In any case I fail to see why Mr Cooper’s employment is properly characterised as part-time or casual. From the time of the introduction of the afternoon shift he worked fewer days (four, rather than five as before), but either way he worked a 40-hour week. His contract of employment (as evidenced by the letter entitled “Amendment to Previous Letters of Appointment” Maughan sent to him on 2 January 2008) did not describe his employment as part-time or casual and it bears all the hallmarks of a permanent full-time employment arrangement. He was to be paid an annual salary. As I said, he was to work a 40-hour week. He was to be entitled to annual, sick leave and long service leave. In my opinion, he remained a permanent full-time employee after he was transferred to the afternoon shift.
3. It is noteworthy that Mr Cooper did not seek to defend this aspect of the industrial magistrate’s reasoning. His argument rested on the assertion that there could be no entitlement under the award until an employee had accrued sufficient service to be eligible for long service leave. For the reasons given above, this argument must be rejected.
4. There were, therefore, “applicable award-derived long service leave terms” in this case. Consequently, Mr Cooper’s entitlement to long service leave was governed by those terms and not by the terms of the State Act. In other words, the State Act did not apply. The industrial magistrate erred in determining otherwise.

## At what rate is long service leave payable?

1. The final question is the rate at which long service leave is payable under the State Act, if the State Act applies. In view of the conclusion I have reached, it is unnecessary to answer this question but for completeness I will do so.
2. Section 8(4)(a) of the State Act provides that a payment in lieu of long service leave made under the Act on the termination of employment “will be calculated at the worker’s ordinary weekly rate of pay applicable immediately before the termination”.
3. Section 3(2) of the State Act relevantly defines “ordinary weekly rate of pay” for the purposes of the Act as the weekly rate of pay at the relevant date “exclusive of overtime, shift premiums and penalty rates”.
4. The industrial magistrate noted that Mr Cooper’s contract “notionally” included a shift premium but found that Mr Cooper’s ordinary rate of pay nevertheless included that premium because “no specific shift loading or premium was calculated and paid on top of a set weekly wage”. His Honour said that s 3(2) did not require “an artificial dissection of the stated annual remuneration”. But, as Maughan submitted, that is to ask the wrong question. The correct question is: what is the weekly rate of pay exclusive of overtime, shift premiums and penalty rates? As I have already observed, the contract discloses the payment of a shift premium or penalty rate. The State Act requires that it be excluded from the calculation of the employee’s entitlement. The industrial magistrate erred in determining otherwise.

## Conclusion

1. I would therefore answer the questions posed at [8] above in this way:
2. The “base rate of pay” for the purpose of calculating the redundancy entitlement is not Mr Cooper’s weekly salary as at the date he last worked, as the industrial magistrate decided, but his weekly salary minus the 18% “penalty rate” for afternoon shift work, that 18% being a “separately identifiable amount” within s 16(1) of the FW Act.
3. Mr Cooper was not entitled to long service leave.
4. It follows that the appeal should be upheld and the orders Maughan seeks should be made. Mr Cooper does not quarrel with the calculations in those orders or the form of them. There was no application for costs.
5. The orders I propose, then, are:
6. The appeal be allowed.
7. Order 2 made by the industrial magistrate on 14 April 2014 be set aside and the respondent’s entitlement to redundancy pay be calculated on the basis of his base rate of pay, being his weekly salary as at 16 September 2011 less the 18% shift premium, namely $9,842.
8. Order 4 made by the industrial magistrate on 14 April 2014 be set aside and the respondent’s claim in respect of long service leave be dismissed.
9. Order 5 made by the industrial magistrate on 14 April 2014 be set aside and the respondent’s entitlement to pre-judgment interest be $2,322.75.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann. |

Associate:

Dated: 1 August 2014